

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS

In Re:)
RICHARD J. SILVA,) Chapter 7
Debtor.) Case No. 18-13128

PETER B. TROWT and BEVERLY)
STORAGE WAREHOUSE & TRAILER)
LEASING, INC.,) Adv. Proceeding No.
Plaintiffs,)
vs.)
RICHARD J. SILVA,)
Defendant.)

AFFIDAVIT OF ATTORNEY ERIC R. LEBLANC, ESQ., IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Eric R. LeBlanc, Esq., on oath do depose and state the following:

1. I am an attorney in good standing and licensed to practice in the Commonwealth of Massachusetts since 2006.
2. I was the attorney of record and represented the Plaintiffs in the instant adversarial proceedings, Peter B. Trowt (“Mr. Trowt”) and Beverly Storage Warehouse & Trailer Leasing, Inc. (“BSWTL”)(collectively the “Plaintiffs”), as Plaintiffs in a state court action (the “State Court Action”) against the Defendant in the instant adversarial proceedings, Richard J. Silva (“Silva”), who was also the Defendant in the State Court Action. See Trowt v.

Silva, Essex County Superior Court Department, Civil Action No. 2011-01279. A true and accurate copy of the State Court Action Docket is attached hereto as Exhibit A.

3. In the State Court Action, the Plaintiffs brought claims for Breach of Fiduciary Duty, Conversion, and Breach of Contract against Silva based on Silva's unlawful conduct as an officer of BSWTL, as more thoroughly presented in the Plaintiffs' accompanying Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment.

4. The Plaintiffs and Silva litigated the State Court Action over five (5) days of jury-waived trial between February 3, 2014 and February 10, 2014.

5. On October 31, 2014, the Court (Cornetta, J.) in the State Court Action issued its Findings of Fact, Rulings of Law, and Order for Judgment in the State Court Action. A true and accurate copy of the Findings of Fact, Rulings of Law, and Order for Judgment in the State Court Action is attached hereto as Exhibit B.

6. In its Findings of Fact, Rulings of Law, and Order for Judgment, the Court (Cornetta, J.) entered Judgment in favor of the Plaintiffs on all of their claims against Silva (Breach of Fiduciary Duty, Conversion, and Breach of Contract), based on Silva's conduct as an officer of BSWTL as more thoroughly set out in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment. (Id.).

Signed under the pains and penalties of perjury this 20 day of December, 2018.



Eric R. LeBlanc, Esq. (BBO# 666786)

EXHIBIT A

1177CV01279 Trowt, Peter vs. Silva, Richard J et al

- Case Type
Equitable Remedies
- Case Status
Open
- File Date
07/05/2011
- DCM Track:
F - Fast Track
- Initiating Action:
Other Equity Action
- Status Date:
01/30/2017
- Case Judge:
- Next Event:

[All Information](#) [Party](#) [Judgment](#) [Subsequent Action/Subject](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

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[More Party Information](#)**Judgments**

<u>Date</u>	<u>Type</u>	<u>Method</u>	<u>For</u>	<u>Against</u>
11/04/2014				

Subsequent Action/Subject

<u>SA/Subject #</u>	<u>Status Date</u>	<u>Pleading Party</u>	<u>Responding Party</u>	<u>Judgments</u>	<u>Status</u>	<u>Description</u>
1		Beverly Storage Warehouse & Trailer Leasing Inc	Trowt Moving and Storage Inc	0	Open	3rd Party Complaint

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
10/20/2011 04:00 PM	Civil D		Status Review		Rescheduled
11/10/2011 02:00 PM	Civil D		Hearing on Order of Notice		Canceled
12/07/2011 04:00 PM	Civil D		Status Review		Canceled
06/29/2012 04:00 PM	Civil D		Status Review		Rescheduled
01/31/2013 04:00 PM	Civil D		Status Review		Canceled
02/05/2013 04:00 PM	Civil D		Status Review		Canceled
03/12/2013 02:00 PM	Civil D		Final Pre-Trial Conference		Held as Scheduled
09/17/2013 02:00 PM	Civil D		Final Trial Conference		Rescheduled
09/23/2013 09:00 AM	Civil D		Jury Trial		Rescheduled
11/14/2013 02:00 PM	Civil D		Final Trial Conference		Rescheduled
11/18/2013 09:00 AM	Civil D		Jury Trial		Rescheduled
01/28/2014 02:00 PM	Civil D		Final Trial Conference		Not Held
01/28/2014 02:00 PM	Civil C		Final Trial Conference		Held as Scheduled
02/03/2014 09:00 AM	Civil C		Non-Jury Trial		Held as Scheduled

Case 18-01168 Doc 9 Filed 12/21/18 Entered 12/21/18 12:10:46 Desc Main

Date	Session	Location	Type	Event Judge	Result
02/03/2014 09:00 AM	Civil D		Jury Trial		Not Held
02/04/2014 09:00 AM	Civil C		Non-Jury Trial		Held as Scheduled
02/06/2014 09:00 AM	Civil C		Non-Jury Trial		Held as Scheduled
02/07/2014 09:00 AM	Civil C		Non-Jury Trial		Held as Scheduled
02/10/2014 09:00 AM	Civil C		Non-Jury Trial		Held as Scheduled
02/28/2014 04:00 PM	Civil C		Status Review		Canceled
04/25/2014 04:00 PM	Civil C		Status Review		Canceled
05/16/2014 04:00 PM	Civil C		Status Review		Canceled
05/30/2014 04:00 PM	Civil C		Status Review		Canceled
06/27/2014 04:00 PM	Civil C		Status Review		Canceled
08/29/2014 04:00 PM	Civil C		Status Review		Canceled
09/26/2014 04:00 PM	Civil C		Status Review		Canceled
10/31/2014 04:00 PM	Civil C		Status Review		Canceled
11/28/2014 04:00 PM	Civil C		Status Review		Canceled
12/10/2014 04:00 PM	Civil C		Status Review		Held as Scheduled
12/17/2014 10:00 AM	Civil C		Hearing on Preliminary Injunction		Held as Scheduled
12/18/2014 02:00 PM	Civil C		Post-Judgment Hearing		Rescheduled
01/07/2015 04:00 PM	Civil C		Status Review		Not Held
01/20/2015 02:00 PM	Civil C		Post-Judgment Hearing		Rescheduled
01/27/2015 02:00 PM	Civil C		Post-Judgment Hearing		Not Held
02/03/2015 02:00 PM	Civil C		Post-Judgment Hearing		Held as Scheduled
02/04/2015 04:00 PM	Civil C		Status Review		Held as Scheduled
03/04/2015 04:00 PM	Civil C		Status Review		Held as Scheduled
04/08/2015 04:00 PM	Civil C		Status Review		Held as Scheduled
07/09/2015 02:00 PM	Civil C	LAWRENCE-2nd FL, CR 2 (SC)	Rule 12 Hearing	Cornetta, Hon. Robert A.	Held as Scheduled
02/04/2016 02:00 PM	Civil C		Motion Hearing		Rescheduled
02/18/2016 02:00 PM	Civil D		Hearing: Sanctions		Rescheduled
02/25/2016 02:00 PM	Civil D	LAWRENCE-2nd FL, CR 3 (SC)	Hearing: Sanctions	Wall, Hon. Joshua	Held as Scheduled
11/17/2016 02:00 PM	Civil C	LAWRENCE-2nd FL, CR 3 (SC)	Motion Hearing to Compel	Wall, Hon. Joshua	Held - Under advisement

Date	Session	Location	Type	Page	Event Judge	Result
07/13/2017 02:00 PM	Civil C	LAWRENCE-2nd FL, CR 3 (SC)	Hearing on Contempt		Wall, Hon. Joshua	Rescheduled
09/14/2017 02:00 PM	Civil C	LAWRENCE-2nd FL, CR 3 (SC)	Hearing on Contempt		Wall, Hon. Joshua	Rescheduled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	07/05/2011	11/30/2011	148	02/04/2015
Answer	07/05/2011	11/02/2011	120	02/04/2015
Rule 12/19/20 Served By	07/05/2011	11/02/2011	120	02/04/2015
Rule 12/19/20 Filed By	07/05/2011	12/02/2011	150	02/04/2015
Rule 12/19/20 Heard By	07/05/2011	01/01/2012	180	02/04/2015
Rule 15 Served By	07/05/2011	11/02/2011	120	02/04/2015
Rule 15 Filed By	07/05/2011	12/02/2011	150	02/04/2015
Rule 15 Heard By	07/05/2011	01/01/2012	180	02/04/2015
Discovery	07/05/2011	10/30/2012	483	02/04/2015
Rule 56 Served By	07/05/2011	12/30/2012	544	02/04/2015
Rule 56 Filed By	07/05/2011	01/31/2013	576	02/04/2015
Final Pre-Trial Conference	07/05/2011	03/31/2013	635	02/04/2015
Judgment	07/05/2011	04/25/2013	660	02/04/2015
Under Advisement	07/09/2015	08/08/2015	30	09/03/2015
Under Advisement	11/17/2016	12/17/2016	30	12/14/2016

Docket Information

Docket	Docket Text	File Ref Nbr.
<u>Date</u>		
07/05/2011	Complaint & civil action cover sheet filed	1
07/05/2011	Origin 1, Type D99, Track F.	
09/28/2011	Plaintiff's MOTION to extend time for service of complaint until 11/30/11	2
09/28/2011	Motion (P#2) After hearing, ALLOWED (Thomas R. Murtagh, Justice) Notices mailed 9/28/2011	
09/28/2011	Plaintiff's MOTION for appointment of special process server Ronald DiGiorgio	3
09/28/2011	Motion (P#3) ALLOWED (Thomas R. Murtagh, Justice) Notice in hand 9/28/11	
11/07/2011	Plaintiff's ex parte MOTION for Preliminary Injunction	4
11/07/2011	Notice ORDER issued, hereon returnable at the D on 11/10/2011 to show cause why Preliminary Injunction should not be granted (Murtagh, Justice)	
11/08/2011	First amended complaint	5
11/10/2011	Joint MOTION for Preliminary Injunction	6
11/17/2011	SERVICE RETURNED (order of notice): Richard J Silva	7
11/21/2011	ORDER for Preliminary Injunction (Thomas R. Murtagh, Justice)	8
11/30/2011	ANSWER: Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc	9

<u>Docket Date</u>	<u>Docket Text</u>	<u>Document</u>	<u>Page</u> 8 of 43	<u>File Ref Nbr.</u>
11/30/2011	COUNTERCLAIM of Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc v Peter Trowt			
12/06/2011	Amended ANSWER: Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc			10
12/06/2011	COUNTERCLAIM of Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc v Peter Trowt			
12/06/2011	Complaint of 3d-party Plf Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc v Trowt Moving and Storage Inc along with filing fee in the amt of \$240.00.			
01/18/2012	ANSWER by Peter Trowt to COUNTERCLAIM of Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc			11
01/18/2012	ANSWER by (3d pty def): Trowt Moving and Storage Inc			
02/08/2012	Affidavit of acceptance of service of Eric R LeBlanc re: (3rd pty summons): Trowt Moving and Storage Inc, service made on 2/2/2012 (in hand/agent/attorney)			12
04/18/2012	Joint MOTION to amend tracking deadlines			13
05/01/2012	Motion (P#13) ALLOWED (Richard E. Welch III, Justice) Notices mailed 5/1/2012			
02/05/2013	Notice sent to appear for pre-trial conference on 3/12/2013			
03/13/2013	Joint pre-trial memorandum filed			14
09/03/2013	JOINT MOTION to Continue Trial Until November 18, 2013			15
09/09/2013	Motion (P#15) ALLOWED (Robert L. Ullmann, Justice) Notices mailed 9/9/2013			
09/09/2013	Notice sent to appear for trial by jury on 11/18/2013			
11/01/2013	Defendant Richard J Silva's MOTION to continue Trial Date			16
11/01/2013	Peter Trowt and Trowt Moving & Storage's Opposition to Defendant's Motion to Continue			17
11/05/2013	Motion (P#16) upon consideration of the motion and opposition to continue the trial is ALLOWED. A new trial date shall issue. Neither party should expect any future motions to continue the trial date to be allowed. (James F. Lang, Justice) Notices mailed 11/5/2013			
11/05/2013	Notice sent to appear for trial by jury on 2/3/2013			
01/29/2014	Copy of Exhibit A that was inadvertently omitted from Motion to Preclude			18
01/29/2014	Opposition to Motion in Limine filed by Richard J Silva			19
01/29/2014	SUBSTITUTE DOCKET FORM: Pltf's motion seeking to preclude defendant's use of expert witness testimony at trial is denied, conditional upon the defendants transmitting forthwith to the pltf's counsel the curriculum vital of the proposed expert witness together with a summation of the proposed expert witness's testimony @ trial. This documentation shall be provided to the pltf's atty. no later than 11:00 AM, January 31, 2014. Failing the same, the defendants shall be precluded from seeking expert evidence @ trial. (Robert A. Cornetta, Justice)			20
01/29/2014	Defendant-Plaintiff-In-Counterclaim Richard Silva's Trial Witness List, filed in court 1/28/2014Witness list			21
01/29/2014	Witness list of Plaintiff/Defendant In Counterclaim Peter Trowt and Third Party Defendant Trowt Moving and Storage, Inc., filed in court 1/28/2014			22
01/30/2014	Plaintiff Peter Trowt's MOTION for leave to preclude Defendant's use of expert witness testimony at trial			23
02/10/2014	Joint pre-trial memorandum filed in court 2/3/2014			24
03/03/2014	Proposed findings of Fact and Conclusions of Law of Plaintiff Peter Trowt and Third Party Defendant, Trowt Moving & Storage, Inc. filed in hand to Essex Superior Court Clerk's Office on 2/28/2014			25
03/03/2014	Proposed Findings of Fact and Rulings of Law of Richard Silva, filed 02/28/2014			26

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT INTRODUCTION

The plaintiff, Peter Trowt (Trowt), and the defendant, Richard Silva (Silva), each own a fifty percent interest in Beverly Storage Warehouse & Trailer Leasing, Inc. (Beverly Storage). This case involves the breakdown of their business relationship and the alleged misappropriation of certain Beverly Storage assets. On November 8, 2011, Trowt filed the First Amended Complaint and, on December 5, 2011, Silva filed the Amended Counterclaim and Third Party Claim. In order to resolve this matter, the court held a five-day jury waived trial between February 3, 2014 and February 10, 2014. Trowt asserts claims against Silva, individually, for breach of fiduciary duty (Count II) and breach of contract (Count III), as well as derivatively, on behalf of Beverly Storage, for breach of fiduciary duty (Count I) and conversion (Count IV). He also asserts a claim for an accounting. Essentially, Trowt argues Silva violated his duty of utmost good faith and loyalty by misappropriating certain Beverly Storage assets to his (Trowt's) detriment. Trowt accuses Silva of three basic categories of misconduct. First, Trowt alleges that, contrary to their agreement to split profits fifty-fifty, Silva, who was responsible for all of Beverly Storage's financial matters, unevenly distributed company profits by paying himself a higher salary. Second, Trowt claims that Silva siphoned cash from customer payments meant to be deposited in Beverly Storage's accounts. Third, Trowt contends Silva misappropriated assets by using company credit cards to pay for personal items/expenses. At trial, in support of these claims, Trowt offered the expert testimony of Kathy L. Parker (Parker), a certified public accountant with a Master of Science in Taxation. Silva asserts claims against Trowt, individually, for breach of fiduciary duty (Counterclaim I) and breach of contract (Counterclaim III), as well as derivatively, on behalf of Beverly Storage, for breach of fiduciary duty (Counterclaim II). In addition, Silva asserts a third-party claim against Trowt Moving & Storage, Inc. (Trowt Moving), which is Trowt's separately owned moving business, for breach of contract. Basically, Silva claims Trowt breached his duties of good faith and loyalty and caused Beverly Storage and thus, him, economic harm by permitting Trowt Moving to use Beverly Storage's land and facilities without paying rent. At trial, Silva offered no expert testimony or other evidence sufficient to support of these claims. In particular, aside from his own speculations, he offered no evidence describing his measure of damages. FINDINGS OF FACT Based upon the evidence presented at trial, including the credible testimony of each party's witnesses and the various exhibits that were submitted, the court makes the following findings of fact. The Parties and Relevant Business Entities: Trowt is an individual residing in Beverly, Massachusetts. At all times relevant to the current matter, Trowt has owned a fifty percent interest in Beverly Storage. Silva is an individual residing in Salem, Massachusetts. At all times pertaining to the current dispute, Silva has also owned a fifty percent interest in Beverly Storage. Beverly Storage is a small closely held corporation with a principal place of business at 145 Rear Hale Street, Beverly, Massachusetts.¹ Beverly Storage receives revenue from its customers in two ways: (1) from the rental of storage rooms at its warehouse in Beverly; and (2) from the rental of one of approximately forty-two various sized trailers, which it pays \$2,000.00 per month to store at a rental location in Manchester-by-the-Sea, Massachusetts. Beverly Storage is named in this suit in order for the parties to obtain requested derivative relief. Trowt Moving is a business entity formed under the laws of Massachusetts. It has a principal place of business also located at 145 Rear Hale Street. Trowt is the sole shareholder and President of Trowt Moving. Trowt Moving is a moving company that moves personal items belonging to its customers from one place to another. In the late 1980s, Silva worked for Trowt Moving. Then, in 1993, Trowt and Silva formed a partnership when each purchased a fifty percent interest in Beverly Storage. In 1993, Trowt and Silva also each purchased a fifty percent ownership interest in the land located at 145 Rear Hale Street, which is currently owned by a realty trust identified as the 145 Rear Hale Street Realty Trust (the Realty Trust).² In 1997, Trowt and Silva formally incorporated Beverly Storage and each became a fifty percent shareholder. In this case, Silva claims Trowt Moving unfairly and without compensation made use of Beverly Storage's land and facilities. The court finds that the evidence presented at trial demonstrated that there is a symbiotic relationship between Trowt Moving and Beverly Storage. Even before Trowt and Silva became partners and shareholders in Beverly Storage, Trowt Moving and Trowt accounted for the origination of approximately ninety-five percent of Beverly Storage's customers. To this day,

Trowt and Trowt Moving are still responsible for the origination of a significant portion of Beverly Storage's business. Trowt Moving also provided Beverly Storage with other benefits. For example, Trowt Moving regularly moves and transports trailers belonging to Beverly Storage, which contain goods and property belonging to Beverly Storage's customers, as Beverly Storage does not own its own tractor. In addition, Trowt Moving's employees regularly spend time performing tasks for Beverly Storage, getting customers to sign contracts, answering the office telephone, sending out bills, addressing customer concerns, and collecting certain fees. Beverly Storage does not pay Trowt Moving any money or reimburse it in any way for these tasks. Thus, the court finds that, to the extent that Trowt Moving may have benefited from its relationship with Beverly Storage, Beverly Storage benefited equally from the relationship. **TROWT S CLAIMS Beverly Storage Management & Operations:** Beverly Storage has only distributed profits in the form of weekly salaries. In 1993, when Trowt and Silva purchased Beverly Storage's assets, they agreed to split all the business profits and losses equally, on a fifty-fifty basis. Later, at some point in 1994, Trowt agreed to allow Silva to collect a higher salary than he (Trowt) was receiving, at a ratio of sixty-five (Silva) to thirty five (Trowt) percent. Nevertheless, thereafter, when Trowt and Silva officially incorporated the business in 1997, they reverted back to their original agreement that all profits and losses would be split on a fifty-fifty basis. From the commencement of Trowt and Silva's partnership in 1993 until some point after the start of this litigation, Silva was responsible for all financial aspects of the company, including, accounts receivable, accounts payable, and vendor payments, as well as other office administration tasks. Silva was the only person at Beverly Storage with access to company passwords, bank accounts, credit cards, and payroll services. Silva was the only person who dealt with Beverly Storage's accountant and was responsible for all the company's accounting functions. Trowt, on the other hand, was responsible for generating business for Beverly Storage, which included providing estimates and maintaining good client relations. Sometime in or about 2006 or 2007, after Silva started his own travel business, Clear Skys Travel (Clear Skys), the division of responsibilities began to shift. Trowt and Trowt Moving employees began assuming some of the office administration tasks Silva had typically completed, as he was no longer at the office on a full-time basis. By the time litigation began in 2011, Silva was, generally, not at Beverly Storage during the company's regular business hours, which required that Trowt or Trowt Moving's employees handle all day-to-day office administration tasks. Later, in or about late 2012, Trowt officially took over handling a majority of the accounts receivable functions and processed a majority of all customer payments. **Unequal Salaries:** In 1993, when Trowt and Silva purchased Beverly Storage, they agreed to split profits evenly, each receiving an equal salary. At some point in 1994, Silva began receiving a higher salary than Trowt, at a sixty-five to thirty-five percent ratio. Thereafter, following the 1997 incorporation of Beverly Storage, Trowt and Silva agreed to go back to splitting profits on a fifty-fifty basis. By mid to late 1999, Trowt and Silva were receiving equal pay. Sometime in mid to late 2000, Trowt's salary was lowered and profits were being split at a sixty-five to thirty-five percent ratio in Silva's favor. Silva made this change without Trowt's knowledge or consent. From 2006 until November 2011, Silva received a higher salary than Trowt. In fact, between 2006 and late 2011, salaries were split between Trowt and Silva at a seventy-five to twenty-five percent ratio favoring Silva. Trowt never agreed to this salary adjustment and did not discover the seventy-five twenty-five percent split until the latter part of 2010. At that time, Trowt instructed Silva to equalize their salaries, but he (Silva) refused. In fact, Silva, who had sole control of Beverly Storage's payroll, instructed Craig & Withers, Beverly Storage's accountant, to ignore Trowt's demands for equal pay. When Trowt contacted Craig & Withers, he was informed that per Silva's instructions, they could not make any adjustments to his salary. Trowt and Silva's salaries were not equalized until November 2011, when Trowt obtained a preliminary injunction in connection with this case ordering Silva to make their salaries equal. From 2006 to November 2011, Silva received \$359,575.00 in salary from Beverly Storage while Trowt received only \$141,250.00 in salary from Beverly Storage. Exhibit 17, Parker, Expert Witness Report, October 14, 2013 (hereinafter, The Parker Report). Thus, from 2006 to November 2011, when Trowt and Silva agreed to split profits on a fifty-fifty basis, when salaries were the only form of profit distribution Beverly

Docket
Date

Docket Text

Document Page 11 of 43

File
Ref
Nbr.

Storage made, and when Silva was solely responsible for the company's payroll, Silva paid himself \$218,325.00 more than he paid Trowt. Id.

Siphoning Revenue: In addition to paying himself a higher salary, Silva siphoned revenue and cash from Beverly Storage. Between 2006 and 2011, according to business records, Beverly Storage's revenue remained relatively flat, averaging approximately \$200,000.00 per year. The Parker Report. Then, in late 2012, when Trowt took over the accounts receivable, including the responsibility for depositing all customer payments into Beverly Storage's bank account, revenue spiked. Id. In fact, annualizing the total deposits through August 2013, shows a nineteen percent increase in revenue for 2013. Id. During this spike in revenue, Beverly Storage made no operational changes other than the fact that Trowt began handling Beverly Storage's deposits. Being conservative, estimating Silva was skimming only ten percent from Beverly Storage's revenues, there would be an additional \$140,815.20 in deposits for the period between January 2006 and December 2011. Id. Silva also used funds from Beverly Storage to put a deposit on land he wished to purchase in Rowley, Massachusetts. Silva's testimony on this issue was contradictory and not credible. First, Silva testified that there was only one piece of land that he wanted to purchase and that the only \$5,000.00 check was shredded by the seller's real estate agent. Then, he testified that the \$5,000.00 deposit check was returned. When Trowt's attorney showed Silva another \$5,000.00 check, written off of Beverly Storage's account, Silva admitted that he had placed a second \$5,000.00 deposit on a second piece of land, which was forfeited. Silva also collected cash from Beverly Storage's customers to bring with him on vacation. At trial, Silva's ex-wife, Mary Rees, testified that, prior to scheduled vacation trips, which occurred at least four times per year, Silva would hoard cash (at least \$500.00) from Beverly Storage's deposits for his personal use. Misappropriation of Beverly Storage's Assets for Personal Use: Between 2006 and 2011, Silva opened at least five credit cards in Beverly Storage's name. Silva opened all of these credit accounts without informing Trowt of their existence. Silva used Beverly Storage's credit cards for numerous personal purchases including: dating websites, i.e., match.com and singlesnet.com, restaurants, motorcycle stores, Stop & Shop, numerous gas purchases, massage parlors, shoe polish, noise canceling headphones, numerous telephones, and other various purchases unrelated to the warehouse and storage business. Silva made personal use of every credit account he opened in Beverly Storage's name. When questioned about these allegations at trial, Silva had no credible explanation for the various personal charges; he could not recall what was purchased or, for example, credibly explain why Beverly Storage's various credit accounts listed charges for restaurants, massage parlors, grocery stores, etc. Silva used at least \$104,355.00 worth of Beverly Storage's money for his own personal use. The Parker Report. These personal charges were split into four categories of misappropriation: (1) personal expenses, such as dating websites and department stores; (2) automotive expenses, such as gas purchases and automotive repairs; (3) unrelated office supply purchases; and (4) normal but excessive expenses. Id. Parker testified that, in reaching this total, she used conservative estimates and that, if she were able to obtain more credit card records the amount and number of Silva's personal charges would be even greater. The court credits this testimony. Trowt never agreed that Silva could use Beverly Storage's credit accounts for his own personal expenses or for expenses related to Clear Skys. Once this lawsuit began and Beverly Storage's credit accounts were cancelled, all inappropriate and excessive charges stopped. SILVA S COUNTERCLAIMS Permission to Park at 145 Rear Hale Street: Silva seeks \$500.00 per week from Trowt Moving as payment for it parking eight pieces of equipment at 145 Rear Hale Street. Trowt Moving has parked its vehicles at 145 Rear Hale Street since 1993. There was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva that Trowt Moving would pay \$500.00 per week to park its vehicles at 145 Rear Hale Street. During trial, Silva provided no evidence, aside from his own speculation, as to the reasonable value of the parking spaces Trowt Moving uses. Moreover, the only parking bill Silva presented is dated October 2013, which is two years after litigation commenced. Overnight Storage: Silva seeks overnight storage fees from Trowt Moving for it charging to keep customers' goods on its trucks parked at 145 Rear Hale Street for one or two nights when customers need to be out of their old home before they can move into their new home. Silva has known that Trowt Moving charges overnight storage fees since at least 2003. And, there was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva whereby Trowt

Moving agreed to pay Beverly Storage overnight storage fees in these circumstances. At trial, aside from his own speculation, Silva provided no evidence relating to the amount of damage Beverly Storage sustained as a result of Trowt Moving's collection of overnight storage fees.⁴ Office Space: Silva seeks monthly rental fees from Trowt Moving for its use of office space located at 145 Rear Hale Street. The office, which Trowt Moving uses, was constructed, built, and paid for solely by Trowt Moving. And, there was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva that Trowt would pay for the use of this office space. During trial, Silva provided no evidence, aside from his own speculation, as to what would constitute a reasonable rental fee for the office space Trowt Moving uses. Moreover, the only office rental bill Silva presented is dated November 2011, right around the time Trowt commenced this suit. See Exhibit 22. Miscellaneous Claims: Silva claims that a Trowt Moving employee damaged a trailer belonging to Beverly Storage and that, Trowt Moving refused to pay for the damage. Silva has, however, known about this alleged damage since 2005 and, at trial, he presented no evidence showing the damage included or the cost of repairs. Silva seeks to charge Trowt Moving for storing trailers at the location Beverly Storage rents in Manchester-by-the-Sea. There was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva that Trowt Moving would pay to store its trailers at the Manchester-by-the-Sea location. This practice has been going on since before 2005 and Trowt Moving has never been billed for storing its trailers at the Manchester-by-the-Sea location. Notably, at least one of Trowt Moving's trailers located in Manchester-by-the-Sea is full of goods belonging to a Beverly Storage customer and Beverly Storage receives all storage fees associated with the use of this trailer. Further, Beverly Storage does not own its own tractor, consequently, the only way the trailers belonging to Beverly Storage can be transported to and from Manchester-by-the-Sea is if Trowt Moving uses its tractor to move them. Silva claims Trowt Moving stores various miscellaneous items belonging to it at 145 Rear Hale Street without Beverly Storage's permission. Based on the evidence presented at trial, the court concludes any miscellaneous property Trowt Moving stores at 145 Rear Hale Street is used for both Trowt Moving and Beverly Storage's customers, including the boxes, crates, pallet jack, padding and plastic wrap. The court further concludes that these items are commingled with similar items belonging to Beverly Storage and, thus, the items are not taking up space that Beverly Storage would otherwise be able to rent. RULINGS OF LAW In this case, Trowt asserts individual claims against Silva for breach of fiduciary duty (Count II) and breach of contract (Count III) as well as derivative claims, on behalf of Beverly Storage, for breach of fiduciary duty (Count I) and conversion (Count IV). Meanwhile, Silva asserts individual claims against Trowt for breach of fiduciary duty (Counterclaim I) and breach of contract (Counterclaim III) as well as a derivative claim, on behalf of Beverly Storage, for breach of fiduciary duty (Counterclaim II). In addition, Silva asserts a third-party claim against Trowt Moving for breach of contract. Below, the court addresses each of these claims. I. Breach of Fiduciary Duty (Counts I & II and Counterclaims I & II) In a close corporation, shareholders owe to the other shareholders and the corporation a duty of utmost good faith and loyalty. Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 593 (1975), quoting Cardullo v. Landau, 329 Mass. 5, 8 (1952) (internal quotations omitted). Essentially, shareholders of a closely held corporation owe to the business and their fellow shareholders substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. Id. This requires that the shareholders place the welfare of the business and that of the other shareholders ahead of their own personal interests. Demoulas v. Demoulas Supermarkets, Inc., 421 Mass. 501, 529 (1997). Shareholders in a close corporation are thus not permitted to frustrate the reasonable expectations of the other shareholders with respect to share ownership, such as with regard to the fair distribution of income and assets, shared decision-making, control of the business, and the receipt of fair value for their contributions to the enterprise. See, e.g., Wilkes v. Springside Nursing Home, Inc., 370 Mass. 843, 850 (1976). The law prohibits shareholders in a close corporation from acting out of avarice, expediency or self-interest in derogation of their duty of loyalty to the corporation and its other stockholders. Donahue, 367 Mass. at 593. In the current matter, Trowt and Silva accuse each other of breaching the fiduciary duty that shareholders in a close corporation owe to each other and the corporation. The elements of such a claim are: (1) the existence of a fiduciary duty, based upon

Docket
Date

Docket Text

Document Page 13 of 43

File
Ref
Nbr.

the relationship of the parties; (2) a breach of that duty; (3) damages; and (4) a causal connection between the breach of duty and the damage suffered. Hanover Ins. Co. v. Sutton, 43 Mass. App. Ct. 153, 164 (1989). The determination of whether a breach of fiduciary duty has occurred is a question of law for the court, as is the remedy for such a breach. See Merola v. Exergen Corp., 423 Mass. 461, 461 (1996). It is undisputed that Beverly Storage is a closely held corporation and that, as such, Trowt and Silva owe each other and it a duty of utmost good faith and loyalty. The only questions left for the court to decide are who breached his fiduciary duty and who is entitled to recover damages. Trowt's Claims: Through the evidence presented at trial, Trowt proved, by a preponderance of the evidence, that Silva breached the fiduciary duty he owed him. In particular, Trowt proved the following relevant facts: that, as of 1997, when Beverly Storage was incorporated, he and Silva agreed to split profits on a fifty-fifty basis; that the only way Beverly Storage distributed profits was through the payment of salaries; that Silva was solely responsible for the distribution of profits; and that Silva unilaterally decreased his (Trowt's) share of the profits by decreasing his (Trowt's) salary, and increasing his own salary. In paying himself a higher salary, i.e., splitting profits at a seventy-five to twenty-five percent ratio in his favor, Silva clearly acted out of avarice and self-interest in derogation of the fiduciary duty he owed Trowt. Consequently, Trowt is entitled to judgment in his favor on Count II (breach of fiduciary duty). As no contrary evidence was presented at trial on the issue of damages, as a starting point, the court accepts the figures set forth in The Parker Report. From 2006 to November 2011, contrary to their agreement to split profits, i.e., to split salaries, on a fifty-fifty basis, Silva paid himself \$359,575.00 in salary while he paid Trowt only \$141,250.00. A fifty-fifty split would have resulted in Trowt and Silva each receiving \$250,412.50. Thus, on Claim II (breach of fiduciary duty), judgment shall enter in favor of Trowt in the amount of \$109,162.50. In addition, Trowt proved, by a preponderance of the evidence, that Silva breached the fiduciary duty he owed Beverly Storage. In fact, the evidence presented reveals two different, but related, bases for this claim. First, the evidence at trial demonstrated that, between 2006 and 2011, while he was solely responsible for all financial matters related to Beverly Storage's operations, including payroll and accounts receivable, Silva siphoned revenues and skimmed profits from the business. Second, the evidence at trial demonstrated that, between this same time frame, Silva opened numerous credit accounts in Beverly Storage's name, which he used for his own personal use. For example, the evidence showed Silva used Beverly Storage's accounts to pay for dating websites, department store charges, grocery store charges, personal gas purchases, automotive repairs, and office supplies used in connection with Clear Skys, his personal travel business. In engaging in this wrongdoing, Silva acted out of avarice and self-interest, contrary to the fiduciary duty he owed Beverly Storage. Consequently, Trowt is entitled to judgment in his favor on Count II (breach of fiduciary duty), as derivative of Beverly Storage. Again, as no contrary evidence was presented at trial on the issue of damages, as a starting point, the court references The Parker Report. If Silva had properly deposited all funds he received into Beverly Storage's account for the period 2006 to November 2011, there would have been an additional \$140,815.20 in deposits.⁵ And, if Silva had not used Beverly Storage's money for his own personal use, the company would also have had another \$104,355.00 in revenue. Thus, on Claim I (breach of fiduciary duty) judgment shall enter in favor of Trowt, derivative of Beverly Storage, in the amount of \$245,170.20. Silva's Counterclaims: On Counterclaims I and II, judgment shall enter in favor of Trowt. Silva failed to provide sufficient evidence to demonstrate Trowt breached the fiduciary duty he owed him or Beverly Storage. These claims are premised upon several different theories. First, Silva claims Trowt breached his fiduciary duty by parking/storing Trowt Moving equipment at 145 Rear Hale Street without paying rent. Second, he claims Trowt breached his fiduciary duty by leaving storage trailers at the Manchester-by-the-Sea location without paying rent. Third, he claims Trowt breached his duty by failing to pay rent for office space he uses at 145 Rear Hale Street. These assertions fail with little analysis. At trial, Silva failed to establish that there was ever any agreement between Trowt/Trowt Moving and Beverly Storage/Silva whereby Trowt Moving would pay to park its equipment at 145 Rear Hale Street, pay to store trailers at the Manchester-by-the-Sea location, or pay to rent office space at 145 Rear Hale Street. Rather, the evidence established that

Docket
Date

Docket Text

Document Page 14 of 43

File
Ref
Nbr.

Trowt Moving and Beverly Storage have a symbiotic relationship. And that, to the extent Trowt Moving benefited from its relationship with Beverly Storage, Beverly Storage equally benefited from that relationship. An example of this symbiotic relationship is demonstrated by the fact that Beverly Storage does not even own a tractor to move its trailers and thus, the only way the storage trailers can be moved from the warehouse in Beverly to the location in Manchester-by-the-Sea is by using Trowt Moving's tractor. Last, Silva argues that, in charging Trowt Moving customers overnight storage fees, Trowt usurped a corporate opportunity from Beverly Storage. This claim appears to be premised on the idea that, if Trowt did not allow its customers to store their items in its trucks overnight, the customers would pay to store their items at Beverly Storage. This claim is without merit. While it is true that a shareholder breaches his fiduciary duty by acquiring or diverting a corporate business opportunity for his personal profit[,] the fact that the corporation would not have been able to avail itself of that opportunity is a defense to such a claim. *Puritan Med. Ctr., Inc. v. Cashman*, 413 Mass. 167, 177-178 (1992). The evidence presented at trial establishes that this was the case in the current matter. Even assuming Trowt Moving's customers would choose to rent space at Beverly Storage, Beverly Storage did not have the manpower and resources to unload and reload Trowt Moving's trucks all to obtain a one or two-day storage fee.⁶ II. Breach of Contract and Conversion Trowt's claim for breach of contract (Count III) and his derivative claim for conversion (Count IV) as well as Silva's counterclaim for breach of contract (Counterclaim III) are subsumed into the above analysis. These claims assert the same theories of liability and request, essentially, the same relief. For this reason, the court need not analyze them in detail. Nevertheless, the court notes the following: With respect to the breach of contract claims, judgment shall enter in favor of Trowt. The evidence presented at trial demonstrated the following relevant facts: that Trowt and Silva had an agreement to split profits on a fifty-fifty basis; that Trowt and Silva had an agreement whereby Silva agreed to be responsible for the business's financial and administrative matters while Trowt served as the primary customer contact; that Silva breached this agreement by paying himself a larger salary and misappropriating funds belonging to Beverly Storage; and that Trowt and Beverly Storage were damaged as a result of Silva's conduct. Similarly, as to the conversion claim, judgment shall enter in favor of Trowt, as the evidence presented at trial demonstrated that Silva misappropriated money rightfully belonging to Trowt and Beverly Storage. III. Silva's Third-Party Claim Against Trowt Moving for Breach of Contract Silva asserts a third-party claim against Trowt Moving for breach of contract in connection with Trowt Moving's failure to pay for parking its vehicles at 145 Rear Hale Street, failing to pay to store its trailers at the Manchester-by-the-Sea location, and for failing to pay rent for the use of office space at 145 Rear Hale Street. This claim fails. To establish a claim for breach of contract, a plaintiff must demonstrate the following: (1) an agreement exists between the plaintiff and the defendant; (2) the plaintiff fully performed his obligations under the agreement; (3) the defendant breached the agreement; and (4) the plaintiff suffered damages as a result of the breach. See *Singarella v. Boston*, 342 Mass. 385, 387 (1961); see also *Richard W. Bishop, Prima Facie Case* 2.1, at 13 (2005). At trial, Silva failed to provide sufficient evidence to demonstrate there was ever any agreement between Trowt/Trowt Moving and Beverly Storage/Silva regarding parking, rental payments, or storage fees.⁷ Instead, the evidence demonstrated that Trowt Moving and Beverly Storage worked in a symbiotic relationship where each used the services and facilities of the other on an as needed basis with no formal reimbursement. Judgment shall enter in favor of Trowt Moving on the third party claim for breach of contract. IV. Accounting Trowt has sought an accounting in this matter. An accounting is proper where a violation of a fiduciary relationship has been established, but reconciling the rights and obligations of the parties is so complicated that it cannot be conveniently accomplished by the court. See *In re Evangelist*, 760 F.2d 27, 29-30 (1st Cir. 1985); *Crane v. Royster*, 255 Mass. 118, 120 (1926). This is not the case here. Instead, in this case, an accounting appears unnecessary. The evidence demonstrates that Trowt is entitled to damages in the amount of \$109,162.50 for his direct claim of breach of fiduciary duty and in the amount of \$245,170.20 for the claim of breach of fiduciary duty, which he asserts derivatively on behalf of Beverly Storage. ORDER Based upon the findings of fact and rulings of law made after trial on the merits, the court shall enter judgment in favor of Trowt

as to all claims he asserts individually against Silva as well as to those he asserts derivatively on behalf of Beverly Storage. Judgment shall also enter in favor of Trowt as to all counterclaims Silva asserts individually against him as well as to those Silva asserts derivatively on behalf of Beverly Storage. Finally, judgment shall enter in favor of Trowt Moving as to Silva's third-party claim for breach of contract. Specifically with respect to Trowt's claim for breach of fiduciary duty, judgment shall enter against Silva in the amount of \$109,162.50. And, as to the claim for breach of fiduciary duty Trowt asserts as derivative of Beverly Storage, judgment shall enter against Silva in the amount of \$245,170.20. Judgment is ORDERED entered accordingly upon the docket by the clerk magistrate and notice shall be provided to the parties pursuant to Mass. R. Civ. P. 58. SO ORDERED : Hon. Robert A. Cornetta Justice .Date: October 31, 2014 (Copies mailed 11/03/2014)

11/04/2014	Judgment This action came on for jury waive trial before the Court, Robert A. Cornetta, Justice, presiding, and the issues having been duly tried, and Court having rendered a "Findings of Fact, Rulings of Law, and Order for Judgment It is ORDERED and ADJUDGED: That judgment be and hereby is entered in favor of Trowt as to all claims he asserts individually against Silva as well as to those he asserts derivatively on behalf of Beverly Storage. Judgment his hereby entered in favor of Trowt as to all Counter/ Claims Silva asserts individually against him as well as to those Silva asserts derivatively on behalf of Beverly Storage. Judgment is hereby entered in favor Trowt Moving as to Silva's third party claim for breach of contract. Specifically with respect to Trowt's claims for breach of fiduciary duty. Judgment is hereby entered against Silva in the amount of \$109,162.50 plus interest from 7/5/2011 thru 11/4/2014 in the amount of \$43,713.23 and; It is further ORDERED and ADJUDGED: That judgment entered as to the claim for breach of fiduciary duty Trowt asserts as derivative of Beverly Storage. Judgment is hereby entered against Silva in the amount of \$245,170.20 with interest from 7/5/2011 thru 11/4/2014 in the amount of \$98,176.41 and its cost of action.	28
11/04/2014	Notice of judgment & copy of Judgment mailed 11/4/2014	
11/10/2014	Defendant Richard Silva notice of appeal (received via fax)	29
11/10/2014	Notice of filing of appeal sent to all parties of record	30
11/14/2014	Copy of letter ordering transcript of Richard J Silva from OTS	31
11/14/2014	Plaintiff and third party defendant Peter Trowt's MOTION to Amend judgment pursuant to Mass. R. Civ. P. 59(e) to include request for attorney's fees and costs	32
11/14/2014	Motion (P#32) Notice to be provided to parties that hearing on this matter will be held on 12/18/14 @ 2:00 pm and the parties may submit memoranda of law to the court no later than 12/5/14. (Robert A. Cornetta, Justice). Notices mailed 11/14/2014	
11/14/2014	Notice sent to appear on 12/18/2014 for a hearing on Motion to amend judgment	
12/04/2014	Defendant Richard J Silva's MOTION to stay pending appeal	33
12/05/2014	Notice of appearance of Richard J Silva, pro se	34
12/05/2014	Attorney, Richard S Gilmore Jr's MOTION to withdraw as counsel of record for Richard J Silva	35
12/08/2014	Motion (P#35) Matter to be scheduled for a hearing with all other pending matters on 12/18/2014. (Thomas Drechsler, Justice). Notices mailed 12/8/2014	
12/08/2014	Memorandum in support of Motion of Plaintiff, Peter Trowt, for Attorneys fees and costs	36
12/08/2014	Affidavit of Eric R. LeBlanc in support of Plaintiff's Motion for Attorney's fees and costs	37
12/08/2014	Motion (P#33) No action taken - Provisions of MRCP 62(D) are self explanatory and have that effect as stated in said rule. (Robert A. Cornetta, Justice). Notices mailed 12/9/2014	
12/10/2014	Plaintiff Peter Trowt, and Third Party Defendant, Trowt Moving and Storage Inc's MOTION for Injunctive Relief Pending Appeal Pursuant to Mass. R. Civ. P. 62(c); (38A) Memorandum in Support, filed 12/9/2014	38

Docket

Docket Text

Document

Page 16 of 43

File Ref Nbr.

12/11/2014	Notice sent to appear on 1/20/2015 for a hearing on Motion of Plaintiff and third party Defendant to amend judgment; Atty. Gilmore's Motion to Withdraw	
12/15/2014	Court received correspondence from Attorney Eric R. LeBlanc requesting that a hearing be held on the Plaintiff's Motion for Injunctive Relief on an emergency basis	39
12/15/2014	Motion (P#39) Parties shall appear on 12/17/2014 at 10:00 a.m. and plaintiff shall provide notice of said expedited hearing to the defendant forthwith. (Robert A. Cornetta, Justice). Notices mailed 12/15/2014	
12/16/2014	Defendant Richard Silva's Motion to Continue Plaintiff's Motion for Injunctive Relief (received via fax)	40
12/16/2014	Defendant Richard Silva's Motion to Continue Plaintiff's Motion for Attorneys Fees (received via fax)	41
12/16/2014	Motion (P#40) DENIED (Robert A. Cornetta, Justice) Notices mailed 12/16/2014	
12/16/2014	Motion (P#41) No action taken at this time. (Robert A. Cornetta, Justice). Notices mailed 12/16/2014	
12/16/2014	Opposition to Plaintiff's Motion for Injunctive Relief filed by Richard J Silva	42
12/22/2014	Ex parte communication from defendant	44

Docket
DateDocket TextDocument
Page 17 of 43File
Ref
Nbr.

12/23/2014 FINDINGS, RULINGS AND ORDER : On November 4, 2014, after multiple days of jury waived trial, judgment in this matter was entered against the defendant, Silva in an aggregate amount in excess of four hundred ninety thousand (\$490,000.00+) dollars. Docketed in this matter are the Court's detailed findings of fact and rulings of law issued after trial upon the merits. The defendant has now filed an appeal of that judgment and, pending said appeal has sought to postpone and stay any further action in this case. After trial, this Court made specific findings of breach of fiduciary duty by the defendant, Silva owed to the plaintiffs and specifically involving misappropriation of funds, deficiencies in record keeping and misfeasance undertaken, all to the detriment of the business. The parties have now been heard upon motion seeking post judgment injunctive relief brought by the plaintiffs against the defendant Silva, once again raising the issues of post judgment misfeasance in his business dealings with the individual and corporate plaintiffs. After hearing, findings are now made that the plaintiffs hold nearly a half million dollar judgment against the defendant, Silva and that his continued involvement in day to day business operations now presents a financial and records retention threat to the well being of that business. Accordingly, and pending the conclusion of the defendant, Silva's appeal in this matter, the following shall now be ORDERED, viz: 1. The defendant, Richard J. Silva, his agents, representatives, successors and assigns shall not enter upon property owned or operated by Trowt Moving and Storage, Inc. or by Beverly Storage Warehouse and Trailer Leasing, Inc., both real and personal. The said defendant may only enter upon any such premises as is consistent with this ORDER now issued. Plaintiffs may take those steps reasonably necessary and commercially acceptable to secure such property against future trespass. 2. The said Richard J. Silva shall return to the plaintiffs all books, documents, records, tax, payroll and banking documents and records (both stored in hard copy and electronically) prior removed by him from the business premises and concerning Trowt Moving and Storage, Inc. and Beverly Storage Warehouse and Trailer Leasing, Inc. Which are in or under the defendant, Silva's possession, care, custody or control. Said return shall be made to the plaintiff, Peter Trowt at a time and place to be mutually agreed to by the said Trowt and Silva, and which shall occur no later than the close of business on January 5, 2015. 3. Pending decision on appeal or until further order of this court, Beverly Storage Warehouse and Trailer Leasing, Inc. shall pay over to the defendant Silva dividends/profits in the amount of eight hundred twenty five (\$825.00) dollars per week in lieu of the current payment to the said Silva made in the amount of one thousand one hundred (\$1,100.00) dollars per week. This amount shall be carried upon the books of the corporation as an expense and shall be duly accounted for to state and federal taxing authorities as part of the overall accounting activities of the business. Pending further order of this Court, the defendant Silva and/or his legal representative shall be allowed access to the records of the business for purposes of examination and copying only during normal business hours and as agreed to by the parties. Any such copying or examination shall be conducted in the presence of a representative of the plaintiffs or a neutral as agreed to by the parties. This ORDER takes effect forthwith and may be modified by motion brought by any party after notice as required by court rules. By the Court: Hon. Robert A. Cornetta, Justice. Dated: December 23, 2014 (Copies mailed 12/23/2014)

12/23/2014 Application (P#41) ALLOWED by agreement (Robert A. Cornetta, Justice)

12/29/2014 Notice sent to appear on 2/3/2015 for a hearing on

02/03/2015 Motion (P#35) This motion has been withdrawn by the moving party in open court on this date. (Robert A. Cornetta, Justice). Notices mailed 2/4/2015

Docket
Date

Docket Text

Document Page 18 of 43

File
Ref
Nbr.

02/04/2015	FINDINGS, RULINGS AND ORDER FOR ENTRY OF JUDGMENT: The parties have appeared and were heard once again regarding post trial issues. The defendant, Silva's counsel of record has advised the Court as of February 3, 2015 of his intention to now remain in the case. The parties have been heard upon motions brought by the defendant, Silva seeking to stay further proceedings pending appeal and upon the plaintiffs motions seeking attorneys fees and costs. Inasmuch as this litigation has been brought also as a derivative action, the plaintiffs as prevailing parties are now entitled to an award of attorneys fees and costs, provided their actions resulted in substantial benefit to the corporation. (See: G.L. Ch. 156D, s. 7.46 (1)). Here, it is clear that among those results obtained by the plaintiffs in this derivative action were the shutting down and misuse of corporate funds attributable to the defendant, Silva's breach of fiduciary duty as well as his conversion of corporate assets. (See decision dated October 31, 2014). These results no doubt afforded Beverly Storage Warehouse & Trailer Leasing, Inc. significant benefit in the nature of actual financial relief, while ultimately saving the business from financial harm. Based upon findings made after trial, the plaintiff's motion seeking to amend this Court's judgment by assessing attorneys fees and costs against the defendant, Richard J. Silva is ALLOWED. After trial, review and consideration of the record now before this Court, including the submissions by parties' counsel, the Court now awards the plaintiff, Trowt attorneys fees in the amount of \$136,144.40 plus costs of \$35,523.85 for a total of \$171,678.25. The outstanding judgment in this matter shall now be amended by the Clerk Magistrate to reflect the same. The defendant, Silva's separate motion argued before the Court which seeks a stay pending appeal (in the nature of a delay in the assessment of attorneys fees and costs) is denied, consistent of course with the provisions of MRCP Rule 62 (d). By the Court: Hon. Robert A. Cornetta, Justice. Dated: February 4, 2015 (Copies mailed 02/04/2015)	45
02/04/2015	Defendant Richard Silva's Opposition to Plaintiff's Motion for Attorneys Fees and Costs (filed in Court 02/03/2015)	46
02/04/2015	Motion (P#46) Exhibit 'A' attached to this memorandum is now ordered stricken from the record. (Robert A. Cornetta, Justice). Notices mailed 2/4/2015	
02/04/2015	Motion (P#32) ALLOWED-see written Findings, Rulings and Order of even date. (Robert A. Cornetta, Justice) Notices mailed 2/4/2015	
02/04/2015	Amended Judgment This action came on before the Court, Robert A. Cornetta, Justice, presiding, and upon consideration thereof, after finding made after trial the plaintiff's motion seeking to amend this Court's judgment by assessing attorney's fees and cost against the defendant, Richard J. Silva motion is allowed, and in consideration of the record now before this Court including submissions by the parties' counsel; is allowed and in consideration of the record now before this Court including submissions by parties' counsel, It is ORDERED AND ADJUDGED: That of the Court now amends its judgment of 11/4/2014 and also awards the plaintiff Peter Trowt Plaintiff/Defendant in Counterclaim attorney's fees, in the amount of \$136,144.40 plus costs of \$35,523.85 for a total of \$171,678.25 Robert A. Cornetta, Justice. Copies mailed 2/4/2015	47
02/04/2015	Notice of judgment & copy of Judgment mailed 2/4/2015	
02/27/2015	Defendant's MOTION to amend order dated 12/23/14	48
04/01/2015	Event Result: The following event: Status Review scheduled for 04/08/2015 04:00 PM has been resulted as follows: Result: Held as Scheduled Reason: By Court prior to date Appeared:	
04/07/2015	Opposition to paper #48.0 (motion to amend order of 12/23/14) filed by Peter Trowt	49
04/07/2015	Endorsement on Motion to amend order of 12/23/14 (#48.0): DENIED see court's written memorandum & ruling of even date	
04/07/2015	MEMORANDUM & ORDER: Upon review of the parties' submissions and based upon prior findings and rulings made by the Court after trial upon the merits, the defendant/plaintiff in counterclaim Silva's motion is DENIED.	50

Docket
Date

Docket Text

Document Page 19 of 43

File
Ref
Nbr.

04/21/2015	Defendant Richard J Silva's Motion to Get Possession of Trial CD's for the following Dates	51
04/23/2015	Endorsement on Motion to possession of trial cd's (#51.0): Other action taken No action taken - Document fails to comply with Rule 9A - Sup. Ct. Rules.	
06/10/2015	Appearance entered On this date Jonathan L. Pickering, Esq. added for Defendant Richard J Silva	
06/10/2015	Appearance entered On this date Jonathan L. Pickering, Esq. added for Defendant Beverly Storage Warehouse & Trailer Leasing Inc	
06/18/2015	Plaintiff Peter Trowt, Trowt Moving and Storage Inc's Motion to Dismiss Appeal for Lack of Prosecution; (52.1) Memorandum in Support of Appellee's Motion to Dismiss for Lack of Prosecution; (52.2) Request for Hearing; (52.3) Richard Silva's Opposition to Motion to Dismiss Appeal for Lack of Prosecution; (52.4) Richard Silva's Affidavit in Support of His Opposition to Motion to Dismiss Appeal for Lack of Prosecution; (52.5) Affidavit of Compliance; (52.6) Notice of Filing; (52.7) Certificate of Service, filed 6/18/2015	52
06/23/2015	The following form was generated: Notice to Appear Sent On: 06/23/2015 13:08:35	
07/09/2015	Matter taken under advisement The following event: Rule 12 Hearing scheduled for 07/09/2015 02:00 PM has been resulted as follows: Result: Held - Under advisement Appeared:	

Docket
DateDocket TextDocumentPage 20 of 43File
Ref
Nbr.

07/13/2015 ORDER: FINDINGS, RULINGS AND ORDER:

53

On November 4, 2011, after jury waived trial, this Court issued extensive written findings, rulings and an order for entry of judgment for the plaintiff in this matter.

On November 10, 2014, the defendant, Richard J. Silva filed his notice of appeal. Thereafter, Silva began prosecuting his appeal pro se.

On December 23, 2014, hearing was held upon the plaintiff's motion seeking post judgment injunctive relief, alleging further misfeasance on the part of Silva (this conduct by said defendant was also found after trial upon the merits). Based upon evidence presented at hearing, an injunction was issued against Silva as a means of conserving and protecting records and assets of certain of the parties.

Meanwhile, the pro se defendant, Silva was not undertaking credible action to prosecute his appeal filed on November 10, 2014. After a series of contacts between said defendant and the Clerk Magistrate's office which was awaiting action by Silva, on April 6, 2015, Mr. Silva was notified that the court's compact discs of the trial were ready for transcription in order that his appeal might move along.

On June 10, 2015, after over two months of inaction by Silva in prosecution of his appeal, the plaintiff moved for dismissal of that appeal for reasons of failure to comply with the rules of appellate procedure and failure to reasonably and timely prosecute his appeal which was filed on November 10, 2014.

The parties were heard on July 9, 2015, upon plaintiff's motion to dismiss the appeal. At hearing, the defendant appeared with counsel.

After hearing, findings are now entered as follows:

In nearly eight (8) months after filing his notice of appeal in this matter, the defendant, Richard J. Silva has failed to comply with MRAP 9 (c) and 10 (a).

Finding is further made that the defendant has failed to prosecute his appeal in timely fashion and has not complied with court rules. Finding of inexcusable neglect on the part of said defendant is now made in this matter based upon the record now before this Court and after hearing. At the time of the July 9, 2015 hearing, said defendant still had not cured his noncompliance with the rules. Thus, at this time, the plaintiff is entitled to the relief he now seeks.

ORDER OF DISMISSAL :

Upon findings made after hearing, with all parties having been heard and represented by counsel and pursuant to MRAP Rule 10 (c), the plaintiff's motion seeking dismissal of the defendant, Richard J. Silva's appeal is ALLOWED and said appeal is dismissed.

By the Court:

Hon. Robert A. Cornetta,
Justice

July 10, 2015

08/06/2015	Request for execution	54
	File sent to SSC	
	Applies To: LeBlanc, Esq., Eric R. (Attorney) on behalf of Trowt Moving and Storage Inc (Other interested party)	
08/12/2015	General correspondence regarding Letter dated July 30, 2015 addressed to the Honorable Robert Cornetta from Richard Silva, received 8/10/2015	55
08/12/2015	Endorsement on Submission of (#55.0): Other action taken	
	Ex parte communication from defendant to be docketed and copy to be forwarded to plaintiff's counsel. Dated 8/11/2015	
09/02/2015	Execution issued on the judgment dated 11/04/2014, (#28.0) against the following party(s): Richard J Silva in favor of Peter Trowt. In the amount of 343,393.99 - judgment in the amount of \$152,875.73 (which includes 43713.23 in pre-judgment interest), plus 35,523.85 in costs, plus 18,719.01 in post-judgment interest on judgment amount plus costs), plus 136,144.40 in attorney's fees for a total execution amount of 343,393.99.	
09/02/2015	Execution issued on the judgment dated 11/04/2014, (#28.0) against the following party(s): Richard J Silva in favor of Beverly Storage Warehouse & Trailer Leasing Inc. In the amount of 377,460.84 - judgment total of 343346.61 (which includes pre-judgment interest) plus post-judgment interest of 34,114.23. Creditor: Beverly Storage Warehouse & Trailer Leasing, Inc. (claims brought derivatively by Peter Trowt)	
11/04/2015	Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc's MOTION for reconsideration of Court Order dated 07/10/2015 re: paper #53.0.	56

Docket Date	Docket Text	Document	Page 21 of 43	File Ref Nbr.
11/04/2015	Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc's Memorandum in support of Motion for Reconsideration			56.1
11/04/2015	Opposition to paper #56.2 Motion for Reconsideration filed by Peter Trowt			56.2
11/04/2015	Affidavit of compliance with Superior Court Rule 9A Applies To: Pickering, Esq., Jonathan L. (Attorney) on behalf of Beverly Storage Warehouse & Trailer Leasing Inc (Defendant)			56.3
11/05/2015	Request for hearing filed Applies To: Silva, Richard J (Defendant)			57
11/09/2015	Endorsement on Motion for reconsideration (#56.0): DENIED Upon review and consideration of the parties' submissions and finding no new evidence in this matter not prior considered by this Court, there being no grounds to otherwise reconsider the Court's final action, motion is denied.			
12/01/2015	Appeal Review by Appeals Court filed on 11/30/2015 by Silva, Richard J			58
12/01/2015	On 11/30/2015, Defendant, Richard Silva filed a Notice to Appeal from the Final Judgment which was entered on 11/09/2015. Copy of Notice of Appeal mailed to all parties of record.			59
12/14/2015	Amended Notice of appeal filed Applies To: Silva, Richard J (Defendant)			60
12/14/2015	On 12/14/2015, The Defendant, Richard Silva filed a Notice to Appeal from the Final Judgment which was entered on 11/09/2015. Copy of Notice of Appeal mailed to All parties of record.			61
12/14/2015	Court received Notice that a transcript has been ordered related to appeal			62
12/21/2015	Defendant Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc's motion to vacate judgment, for new trial			63
12/21/2015	Affidavit filed by Defendant Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc in support of motion to vacate judgment, for new trial			63.1
12/21/2015	Opposition to paper #63.0 (motion to vacate judgment, for new trial) filed by Peter Trowt			63.2
12/23/2015	Endorsement on Motion for relief from judgment and for new trial (#63.0): DENIED Upon review and consideration findings are now entered that the moving party has produced no new evidence in this matter that the affidavit in support of said motion is conclusory and that the motion is not brought in good faith. Motion is denied and , the parties shall now appear for hearing on 2/4/16 @ 2:00 pm to be heard upon pltfs' motion seeking sanctions in this matter.			
12/23/2015	The following form was generated: Notice to Appear Sent On: 12/23/2015 13:08:03			
01/13/2016	The following form was generated: Notice to Appear Sent On: 01/13/2016 09:15:18			
01/27/2016	Plaintiff Peter Trowt's Motion to continue / reschedule an event 02/18/2016 02:00 PM Hearing: Sanctions			64
02/02/2016	Endorsement on Motion to continue / reschedule an event (#64.0): DENIED without prejudice for failure to comply with Rule 9A. Counsel moves for continuances with no input from opposing counsel on what new date is possible for opposing counsel.			
02/09/2016	Plaintiff Peter Trowt's Request to continue / reschedule an event 02/18/2016 02:00 PM Hearing: Sanctions			65
02/09/2016	Defendant Richard J Silva's Motion to Receive Copy of Audio Recordings for the Following Dates: 2/3/2014, 2/4/2014, 2/6/2014, 2/7/2014 and 2/10/2014			66
02/10/2016	Endorsement on Request to received copy of audi recordings (#66.0): DENIED After consideration, the motion is DENIED. Mr. Silva has already received copies of the audio recordings. Dated 2/10/2016			
02/12/2016	Endorsement on Request to continue / reschedule an event (#65.0): ALLOWED			
02/12/2016	The following form was generated: Notice to Appear for sanctions hearing (2/25/16) Sent On: 02/12/2016 08:22:43			
02/25/2016	Appearance entered On this date Pro Se added for Defendant Richard J Silva			

03/23/2016	Endorsement on Motion for audio recordings (#66.0): ALLOWED After hearing and upon reconsideration, the defendant, Richard Silva's request for audio recordings is allowed upon payment of \$50.50 per audio disc.	
04/21/2016	Defendant Richard J Silva, Beverly Storage Warehouse & Trailer Leasing Inc's motion for new trial Defendant's Motion for Relief from Judgment and for New Trial, dated 11/4/15	67
04/21/2016	Affidavit of Affidavit Supporting Defendant's Motion for Relief From Judgment and For New Trial, datd 11/2/15	67.1
04/21/2016	Opposition to paper #67.0 Peter Trowt's Opposition to Motion of Richard Silva and BEverly Storage Warehouse & Trailer Leasing, Inc., for Relief From Judgment and for New Trial, and Cross Motion for Sanctions Pursuant to Mass R.Civ.P. 11(A), dated 11/17/15 filed by Peter Trowt	67.2
04/21/2016	Endorsement on Motion for Relief from Judgment and for New Trial (#67)Motion for Sanctions (67.2) (#67.2): DENIED Judge Cornetta denied the motion for new trial (paper #63) on 12/23/15 and found motion was brought in bad faith. This motion appears to raise the same issues. There is no new evidence presented herein and the motion is DENIED. Sanctions will not be issued but another frivolous or repetitive motion will create a risk of sanctions. Dated 4/13/2016	
04/21/2016	General correspondence regarding Request for audio recordings for 2/3/14, 2/4/14, 2/6/14, 2/7/14 and 2/10/14, with a check in the amount of \$252.50 from Richard Silva on 4/21/2016 (as was approved by the Court, Wall, J. on 3/23/16, upon payment of \$50.50 per audio disc)	68
04/21/2016	General correspondence regarding audio recordings from 2/3/14, 2/4/14, 2/6/14, 2/7/14 and 2/10/14 forwarded to Richard Silva on this date at 14 Dearborn Street, Salem, MA 01970.	
10/05/2016	ORDER sent for Status Review, if notice is not received by 11/09/2016 the complaint will be dismissed. Relating to status of appeal and/or filing transcript with the Court relating to appeal	69
10/13/2016	Status review notice returned This is not settled and still being worked on... Defendant also requested a copy of docket sheet, which was sent.	70
	Applies To: Silva, Richard J (Defendant)	
10/27/2016	Complaint for contempt filed.	71
11/07/2016	Endorsement on Application for Complaint for contempt (#71.0): Other action taken Summons to issue, solely to consider whether an answer is necessary	
11/07/2016	Document: Summons on Contempt (11/17/16) Sent On: 11/07/2016 15:56:54	
11/07/2016	Defendant Richard J Silva's Submission of Legal Argument	72
11/15/2016	Attorney Jonathan L. Pickering, Esq.'s motion to withdraw as counsel of record for party Applies To: Silva, Richard J (Defendant); Beverly Storage Warehouse & Trailer Leasing Inc (Defendant)	73
11/15/2016	Affidavit filed by Defendant Richard J Silva in support of P#73 Applies To: Silva, Richard J (Defendant); Beverly Storage Warehouse & Trailer Leasing Inc (Defendant)	73.1
11/15/2016	Affidavit of compliance with Superior Court Rule 9A Applies To: Pickering, Esq., Jonathan L. (Attorney) on behalf of Silva, Richard J (Defendant)	73.2
11/15/2016	Rule 9A list of documents filed. Applies To: Pickering, Esq., Jonathan L. (Attorney) on behalf of Silva, Richard J (Defendant)	73.4
11/17/2016	Plaintiff Peter Trowt's Motion to Dismiss Richard Silva and Beverly Storage Warehouse & Trailer Leasing, Inc.'s Appeal	74
11/17/2016	Peter Trowt's Memorandum in support of Motion to Dismiss Appeal	74.1
11/17/2016	Request for hearing filed Applies To: Trowt, Peter (Plaintiff)	74.2
11/17/2016	Affidavit of compliance with Superior Court Rule 9A Applies To: Bennett, Esq., Todd Jarrett (Attorney) on behalf of Trowt, Peter (Plaintiff)	74.3
11/17/2016	Matter taken under advisement The following event: Motion Hearing to Compel scheduled for 11/17/2016 02:00 PM has been resulted as follows: Result: Held - Under advisement	

Docket Date	Docket Text	
11/22/2016	Attorney Richard S. Gilmore, Jr., Esq.'s motion to withdraw as counsel of record for party Applies To: Silva, Richard J (Defendant)	75
11/22/2016	Endorsement on Application for Complaint for civil contempt (#71.0): Other action taken After hearing, the Complaint is dismissed with no answer required. Mr. Silva stated at the hearing that he, as shareholder, favored changing accountants for the company. That agreement removes any issue remaining from the events which led to the contempt complaint.	
11/22/2016	Endorsement on Motion to Dismiss Richard Silva and Beverly Storage Warehouse & Trailer Leasing, Inc.'s Appeal (#74.0): ALLOWED Judge Cornetta denied a motion to reconsider on November 9, 2015 which led to a Notice of Appeal filed December 14, 2015. During the 11 months, Mr. Silva has failed to file an appeal. At hearing, Mr. Silva alleged that someone purposely deleted portions of the official court recording, a matter which he said he brought to the attention of the FBI and the "FBI is interested" in investigating further. These statements have absolutely no evidentiary support. There is no good cause for the failure to pursue the appeal and motion to dismiss appeal is allowed.	
11/22/2016	Endorsement on Motion to withdraw as counsel (#75.0): ALLOWED After hearing with Mr. Silva present, it is well established that Attorney Gilmore functionally withdrew long ago. The motion is allowed.	
11/22/2016	Attorney appearance On this date Richard S. Gilmore, Jr., Esq. dismissed/withdrawn as Private Counsel for Defendant Beverly Storage Warehouse & Trailer Leasing Inc	
11/30/2016	Endorsement on Motion to Withdraw as Counsel (#73.0): ALLOWED	
11/30/2016	Attorney appearance On this date Jonathan L. Pickering, Esq. dismissed/withdrawn for Defendant Richard J Silva	
11/30/2016	Attorney appearance On this date Jonathan L. Pickering, Esq. dismissed/withdrawn for Defendant Beverly Storage Warehouse & Trailer Leasing Inc	
06/12/2017	Complaint for contempt filed. Applies To: Trowt, Peter (Plaintiff); Beverly Storage Warehouse & Trailer Leasing Inc (Defendant) **EXHIBITS ATTACHED**	76
06/12/2017	Attorney appearance On this date Steven A. Grant, Esq. added for Defendant Richard J Silva	77
06/14/2017	Endorsement on Motion for complaint for contempt (#76.0): Summons and Order of Notice to issue to determine whether a summons on contempt should issue returnable on 7/13/17 @2:00P.M.in Lawrence Superior Court"C" session.	
06/14/2017	Upon Defendant's request for an order of notice to show cause why aa contempt summons shall not be issued, returnable on 07/13/2017 02:00 PM Hearing on Contempt. The following party(s) is ordered to appear Peter Trowt, Beverly Storage Warehouse & Trailer Leasing Inc.	
07/11/2017	Plaintiff, Defendant Peter Trowt, Richard J Silva's Assented to Motion to continue / reschedule an event 07/13/2017 02:00 PM Hearing on Contempt Hearing be continued by 30 days.	78
07/11/2017	Endorsement on Motion to continue / reschedule an event Hearing on Motion for Complaint for Contempt. (#78.0): ALLOWED Hearing continued to 9/14/17 at 2:00 pm.	
07/11/2017	Event Result: The following event: Hearing on Contempt scheduled for 07/13/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
09/13/2017	Defendant Richard J Silva's Assented to Motion to continue / reschedule an event 09/14/2017 02:00 PM Hearing on Contempt SECOND	79
09/13/2017	Endorsement on Motion to continue / reschedule an event To Continue Hearing on Motion for Complaint for Contempt. (#79.0): ALLOWED	
09/13/2017	Event Result: The following event: Hearing on Contempt scheduled for 09/14/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Request of Defendant	
12/29/2017	Defendant Richard J Silva's Motion for Clarification and Modification	80
12/29/2017	Richard J Silva's Memorandum in support of Motion for Clarification and Modification	80.1

Docket Date	Docket Text	
12/29/2017	Opposition to to Motion for Clarification and Modification and Request for Sanctions filed by Peter Trowt, Beverly Storage Warehouse & Trailer Leasing Inc	81
01/03/2018	General correspondence regarding File to SSC to Judge Feeley re. P. #80	
02/01/2018	Defendant Richard J Silva's Motion to disqualify counsel	82
02/01/2018	Richard J Silva's Memorandum in support of Motion to disqualify counsel	82.1
02/01/2018	Opposition to to Motion to disqualify counsel and request for sanctions filed by Peter Trowt	82.2
02/01/2018	Opposition to to request for sanctions filed by Richard J Silva	82.3
02/01/2018	Certificate of service of attorney or Pro Se: Eric R LeBlanc, Esq.	82.4
02/05/2018	Endorsement on Motion to Disqualify Counsel (#82.0): DENIED Without hearing and for substantially the reasons set forth in the plaintiffs' opposition, the defendant's motion to disqualify plaintiffs' counsel is DENIED. The court believes from the papers presented that both plaintiffs are sophisticated business parties who may decide for themselves whether their joint counsel presents a conflict. Additionally, the defendant's failure to receive a statement that Judge Cornetta's Order is in effect is the basis for no issue or further discussion-without further order by the Court, Judge Cornetta's Order is and remains in full force and effect. Judge: Tucker, Hon. Richard T	
02/13/2018	Endorsement on Motion for Clarification and Modification (#80.0): DENIED After review, motion is denied for reasons stated in plaintiffs' opposition. Plaintiffs' motion for sanctions is denied. Judge: Feeley, Hon. Timothy Q	
02/13/2018	General correspondence regarding File back to Lawrence Superior Court	

Case Disposition

Disposition	Date	Case Judge
Judgment after Non- Jury Trial	02/04/2015	

EXHIBIT B

21

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-01279

PETER TROWT,
Plaintiff/Defendant-in-Counterclaim,

v.

RICHARD SILVA,
Defendant/Plaintiff-in-Counterclaim,

AND

BEVERLY STORAGE WAREHOUSE & TRAILER LEASING, INC.,
Derivatively,

v.

TROWT MOVING & STORAGE, INC.,
Third-Party Defendant.

FINDINGS OF FACT, RULINGS OF LAW,
AND ORDER FOR JUDGMENT

INTRODUCTION

The plaintiff, Peter Trowt (“Trowt”), and the defendant, Richard Silva (“Silva”), each own a fifty percent interest in Beverly Storage Warehouse & Trailer Leasing, Inc. (“Beverly Storage”). This case involves the breakdown of their business relationship and the alleged misappropriation of certain Beverly Storage assets. On November 8, 2011, Trowt filed the First Amended Complaint and, on December 5, 2011, Silva filed the Amended Counterclaim and Third Party Claim. In order to resolve this matter, the court held a five-day jury waived trial between February 3, 2014 and February 10, 2014.

Trowt asserts claims against Silva, individually, for breach of fiduciary duty (Count II) and breach of contract (Count III), as well as derivatively, on behalf of Beverly Storage, for breach of fiduciary duty (Count I) and conversion (Count IV). He also asserts a claim for an accounting. Essentially, Trowt argues Silva violated his duty of utmost good faith and loyalty by misappropriating certain Beverly Storage assets to his (Trowt's) detriment. Trowt accuses Silva of three basic categories of misconduct. First, Trowt alleges that, contrary to their agreement to split profits fifty-fifty, Silva, who was responsible for all of Beverly Storage's financial matters, unevenly distributed company profits by paying himself a higher salary. Second, Trowt claims that Silva siphoned cash from customer payments meant to be deposited in Beverly Storage's accounts. Third, Trowt contends Silva misappropriated assets by using company credit cards to pay for personal items/expenses. At trial, in support of these claims, Trowt offered the expert testimony of Kathy L. Parker ("Parker"), a certified public accountant with a Master of Science in Taxation.

Silva asserts claims against Trowt, individually, for breach of fiduciary duty (Counterclaim I) and breach of contract (Counterclaim III), as well as derivatively, on behalf of Beverly Storage, for breach of fiduciary duty (Counterclaim II). In addition, Silva asserts a third-party claim against Trowt Moving & Storage, Inc. ("Trowt Moving"), which is Trowt's separately owned moving business, for breach of contract. Basically, Silva claims Trowt breached his duties of good faith and loyalty and caused Beverly Storage and thus, him, economic harm by permitting Trowt Moving to use Beverly Storage's land and facilities without paying rent. At trial, Silva offered no expert testimony or other evidence sufficient to support of these claims. In particular, aside from his own speculations, he offered no evidence describing his measure of damages.

FINDINGS OF FACT

Based upon the evidence presented at trial, including the credible testimony of each party's witnesses and the various exhibits that were submitted, the court makes the following findings of fact.

The Parties and Relevant Business Entities:

Trowt is an individual residing in Beverly, Massachusetts. At all times relevant to the current matter, Trowt has owned a fifty percent interest in Beverly Storage. Silva is an individual residing in Salem, Massachusetts. At all times pertaining to the current dispute, Silva has also owned a fifty percent interest in Beverly Storage. Beverly Storage is a small closely held corporation with a principal place of business at 145 Rear Hale Street, Beverly, Massachusetts.¹ Beverly Storage receives revenue from its customers in two ways: (1) from the rental of storage rooms at its warehouse in Beverly; and (2) from the rental of one of approximately forty-two various sized trailers, which it pays \$2,000.00 per month to store at a rental location in Manchester-by-the-Sea, Massachusetts. Beverly Storage is named in this suit in order for the parties to obtain requested derivative relief.

Trowt Moving is a business entity formed under the laws of Massachusetts. It has a principal place of business also located at 145 Rear Hale Street. Trowt is the sole shareholder and President of Trowt Moving. Trowt Moving is a moving company that moves personal items belonging to its customers from one place to another. In the late 1980s, Silva worked for Trowt Moving. Then, in 1993, Trowt and Silva formed a partnership when each purchased a fifty percent interest in Beverly Storage. In 1993, Trowt and Silva also each purchased a fifty percent

¹ Beverly Storage only has two full time employees, Trowt and Silva, and one part time employee, a young woman who works part-time on Saturdays.

ownership interest in the land located at 145 Rear Hale Street, which is currently owned by a realty trust identified as the 145 Rear Hale Street Realty Trust (the “Realty Trust”).²

In 1997, Trowt and Silva formally incorporated Beverly Storage and each became a fifty percent shareholder. In this case, Silva claims Trowt Moving unfairly and without compensation made use of Beverly Storage’s land and facilities. The court finds that the evidence presented at trial demonstrated that there is a symbiotic relationship between Trowt Moving and Beverly Storage. Even before Trowt and Silva became partners and shareholders in Beverly Storage, Trowt Moving and Trowt accounted for the origination of approximately ninety-five percent of Beverly Storage’s customers. To this day, Trowt and Trowt Moving are still responsible for the origination of a significant portion of Beverly Storage’s business.

Trowt Moving also provided Beverly Storage with other benefits. For example, Trowt Moving regularly moves and transports trailers belonging to Beverly Storage, which contain goods and property belonging to Beverly Storage’s customers, as Beverly Storage does not own its own tractor. In addition, Trowt Moving’s employees regularly spend time performing tasks for Beverly Storage, getting customers to sign contracts, answering the office telephone, sending out bills, addressing customer concerns, and collecting certain fees. Beverly Storage does not pay Trowt Moving any money or reimburse it in any way for these tasks. Thus, the court finds that, to the extent that Trowt Moving may have benefited from its relationship with Beverly Storage, Beverly Storage benefited equally from the relationship.

² Currently, Trowt and Silva are the sole trustees and beneficiaries of the Realty Trust.

TROWT'S CLAIMS

Beverly Storage Management & Operations:

Beverly Storage has only distributed profits in the form of weekly salaries. In 1993, when Trowt and Silva purchased Beverly Storage's assets, they agreed to split all the business profits and losses equally, on a fifty-fifty basis. Later, at some point in 1994, Trowt agreed to allow Silva to collect a higher salary than he (Trowt) was receiving, at a ratio of sixty-five (Silva) to thirty five (Trowt) percent. Nevertheless, thereafter, when Trowt and Silva officially incorporated the business in 1997, they reverted back to their original agreement that all profits and losses would be split on a fifty-fifty basis.

From the commencement of Trowt and Silva's partnership in 1993 until some point after the start of this litigation, Silva was responsible for all financial aspects of the company, including, accounts receivable, accounts payable, and vendor payments, as well as other office administration tasks. Silva was the only person at Beverly Storage with access to company passwords, bank accounts, credit cards, and payroll services. Silva was the only person who dealt with Beverly Storage's accountant and was responsible for all the company's accounting functions. Trowt, on the other hand, was responsible for generating business for Beverly Storage, which included providing estimates and maintaining good client relations.

Sometime in or about 2006 or 2007, after Silva started his own travel business, Clear Skys Travel ("Clear Skys"), the division of responsibilities began to shift. Trowt and Trowt Moving employees began assuming some of the office administration tasks Silva had typically completed, as he was no longer at the office on a full-time basis. By the time litigation began in 2011, Silva was, generally, not at Beverly Storage during the company's regular business hours, which required that Trowt or Trowt Moving's employees handle all day-to-day office

administration tasks. Later, in or about late 2012, Trowt officially took over handling a majority of the accounts receivable functions and processed a majority of all customer payments.

Unequal Salaries:

In 1993, when Trowt and Silva purchased Beverly Storage, they agreed to split profits evenly, each receiving an equal salary. At some point in 1994, Silva began receiving a higher salary than Trowt, at a sixty-five to thirty-five percent ratio. Thereafter, following the 1997 incorporation of Beverly Storage, Trowt and Silva agreed to go back to splitting profits on a fifty-fifty basis. By mid to late 1999, Trowt and Silva were receiving equal pay. Sometime in mid to late 2000, Trowt's salary was lowered and profits were being split at a sixty-five to thirty-five percent ratio in Silva's favor. Silva made this change without Trowt's knowledge or consent.

From 2006 until November 2011, Silva received a higher salary than Trowt. In fact, between 2006 and late 2011, salaries were split between Trowt and Silva at a seventy-five to twenty-five percent ratio favoring Silva. Trowt never agreed to this salary adjustment and did not discover the seventy-five twenty-five percent split until the latter part of 2010. At that time, Trowt instructed Silva to equalize their salaries, but he (Silva) refused. In fact, Silva, who had sole control of Beverly Storage's payroll, instructed Craig & Withers, Beverly Storage's accountant, to ignore Trowt's demands for equal pay. When Trowt contacted Craig & Withers, he was informed that per Silva's instructions, they could not make any adjustments to his salary. Trowt and Silva's salaries were not equalized until November 2011, when Trowt obtained a preliminary injunction in connection with this case ordering Silva to make their salaries equal.

From 2006 to November 2011, Silva received \$359,575.00 in salary from Beverly Storage while Trowt received only \$141,250.00 in salary from Beverly Storage. *Exhibit 17,*

Parker, Expert Witness Report, October 14, 2013 (hereinafter, “*The Parker Report*”). Thus, from 2006 to November 2011, when Trowt and Silva agreed to split profits on a fifty-fifty basis, when salaries were the only form of profit distribution Beverly Storage made, and when Silva was solely responsible for the company’s payroll, Silva paid himself \$218,325.00 more than he paid Trowt. *Id.*

Siphoning Revenue:

In addition to paying himself a higher salary, Silva siphoned revenue and cash from Beverly Storage. Between 2006 and 2011, according to business records, Beverly Storage’s revenue remained relatively flat, averaging approximately \$200,000.00 per year. *The Parker Report*. Then, in late 2012, when Trowt took over the accounts receivable, including the responsibility for depositing all customer payments into Beverly Storage’s bank account, revenue spiked. *Id.* In fact, annualizing the total deposits through August 2013, shows a nineteen percent increase in revenue for 2013. *Id.* During this spike in revenue, Beverly Storage made no operational changes other than the fact that Trowt began handling Beverly Storage’s deposits. Being conservative, estimating Silva was skimming only ten percent from Beverly Storage’s revenues, there would be an additional \$140,815.20 in deposits for the period between January 2006 and December 2011. *Id.*

Silva also used funds from Beverly Storage to put a deposit on land he wished to purchase in Rowley, Massachusetts. Silva’s testimony on this issue was contradictory and not credible. First, Silva testified that there was only one piece of land that he wanted to purchase and that the only \$5,000.00 check was shredded by the seller’s real estate agent. Then, he testified that the \$5,000.00 deposit check was returned. When Trowt’s attorney showed Silva

another \$5,000.00 check, written off of Beverly Storage's account, Silva admitted that he had placed a second \$5,000.00 deposit on a second piece of land, which was forfeited.

Silva also collected cash from Beverly Storage's customers to bring with him on vacation. At trial, Silva's ex-wife, Mary Rees, testified that, prior to scheduled vacation trips, which occurred at least four times per year, Silva would hoard cash (at least \$500.00) from Beverly Storage's deposits for his personal use.

Misappropriation of Beverly Storage's Assets for Personal Use:

Between 2006 and 2011, Silva opened at least five credit cards in Beverly Storage's name. Silva opened all of these credit accounts without informing Trowt of their existence. Silva used Beverly Storage's credit cards for numerous personal purchases including: dating websites, i.e., match.com and singlesnet.com, restaurants, motorcycle stores, Stop & Shop, numerous gas purchases, massage parlors, shoe polish, noise canceling headphones, numerous telephones, and other various purchases unrelated to the warehouse and storage business. Silva made personal use of every credit account he opened in Beverly Storage's name. When questioned about these allegations at trial, Silva had no credible explanation for the various personal charges; he could not recall what was purchased or, for example, credibly explain why Beverly Storage's various credit accounts listed charges for restaurants, massage parlors, grocery stores, etc.³

Silva used at least \$104,355.00 worth of Beverly Storage's money for his own personal use. *The Parker Report*. These personal charges were split into four categories of misappropriation: (1) personal expenses, such as dating websites and department stores; (2) automotive expenses, such as gas purchases and automotive repairs; (3) unrelated office supply

³ At trial, Silva's ex-wife, Rees, testified that, during her marriage to Silva, he would regularly (at least monthly) use Beverly Storage credit cards at restaurants when paying for dinner and state words to the effect that "this one is on the warehouse."

purchases; and (4) normal but excessive expenses. *Id.* Parker testified that, in reaching this total, she used conservative estimates and that, if she were able to obtain more credit card records the amount and number of Silva's personal charges would be even greater. The court credits this testimony. Trowt never agreed that Silva could use Beverly Storage's credit accounts for his own personal expenses or for expenses related to Clear Skys. Once this lawsuit began and Beverly Storage's credit accounts were cancelled, all inappropriate and excessive charges stopped.

SILVA'S COUNTERCLAIMS

Permission to Park at 145 Rear Hale Street:

Silva seeks \$500.00 per week from Trowt Moving as payment for it parking eight pieces of equipment at 145 Rear Hale Street. Trowt Moving has parked its vehicles at 145 Rear Hale Street since 1993. There was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva that Trowt Moving would pay \$500.00 per week to park its vehicles at 145 Rear Hale Street. During trial, Silva provided no evidence, aside from his own speculation, as to the reasonable value of the parking spaces Trowt Moving uses. Moreover, the only parking bill Silva presented is dated October 2013, which is two years after litigation commenced.

Overnight Storage:

Silva seeks overnight storage fees from Trowt Moving for it charging to keep customers' goods on its trucks parked at 145 Rear Hale Street for one or two nights when customers need to be out of their old home before they can move into their new home. Silva has known that Trowt Moving charges overnight storage fees since at least 2003. And, there was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva whereby Trowt Moving agreed to pay Beverly Storage overnight storage fees in these circumstances. At trial, aside from

his own speculation, Silva provided no evidence relating to the amount of damage Beverly Storage sustained as a result of Trowt Moving's collection of overnight storage fees.⁴

Office Space:

Silva seeks monthly rental fees from Trowt Moving for its use of office space located at 145 Rear Hale Street. The office, which Trowt Moving uses, was constructed, built, and paid for solely by Trowt Moving. And, there was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva that Trowt would pay for the use of this office space. During trial, Silva provided no evidence, aside from his own speculation, as to what would constitute a reasonable rental fee for the office space Trowt Moving uses. Moreover, the only office rental bill Silva presented is dated November 2011, right around the time Trowt commenced this suit. See *Exhibit 22*.

Miscellaneous Claims:

Silva claims that a Trowt Moving employee damaged a trailer belonging to Beverly Storage and that, Trowt Moving refused to pay for the damage. Silva has, however, known about this alleged damage since 2005 and, at trial, he presented no evidence showing the damage included or the cost of repairs.

Silva seeks to charge Trowt Moving for storing trailers at the location Beverly Storage rents in Manchester-by-the-Sea. There was never any formal agreement between Trowt Moving/Trowt and Beverly Storage/Silva that Trowt Moving would pay to store its trailers at the Manchester-by-the-Sea location. This practice has been going on since before 2005 and Trowt Moving has never been billed for storing its trailers at the Manchester-by-the-Sea location.

⁴ Even if Trowt Moving collects overnight storage fees from its customers for property it allows them to store on its trucks for a day or two, there is no lost opportunity to Beverly Storage, as Beverly Storage does not have the manpower to unload/reload Trowt Moving's customers' goods into a Beverly Storage trailer, all to obtain a fee for one or two nights of storage.

Notably, at least one of Trowt Moving's trailers located in Manchester-by-the-Sea is full of goods belonging to a Beverly Storage customer and Beverly Storage receives all storage fees associated with the use of this trailer. Further, Beverly Storage does not own its own tractor, consequently, the only way the trailers belonging to Beverly Storage can be transported to and from Manchester-by-the-Sea is if Trowt Moving uses its tractor to move them.

Silva claims Trowt Moving stores various miscellaneous items belonging to it at 145 Rear Hale Street without Beverly Storage's permission. Based on the evidence presented at trial, the court concludes any miscellaneous property Trowt Moving stores at 145 Rear Hale Street is used for both Trowt Moving and Beverly Storage's customers, including the boxes, crates, pallet jack, padding and plastic wrap. The court further concludes that these items are commingled with similar items belonging to Beverly Storage and, thus, the items are not taking up space that Beverly Storage would otherwise be able to rent.

RULINGS OF LAW

In this case, Trowt asserts individual claims against Silva for breach of fiduciary duty (Count II) and breach of contract (Count III) as well as derivative claims, on behalf of Beverly Storage, for breach of fiduciary duty (Count I) and conversion (Count IV). Meanwhile, Silva asserts individual claims against Trowt for breach of fiduciary duty (Counterclaim I) and breach of contract (Counterclaim III) as well as a derivative claim, on behalf of Beverly Storage, for breach of fiduciary duty (Counterclaim II). In addition, Silva asserts a third-party claim against Trowt Moving for breach of contract. Below, the court addresses each of these claims.

I. Breach of Fiduciary Duty (Counts I & II and Counterclaims I & II)

In a close corporation, shareholders owe to the other shareholders and the corporation a duty of utmost good faith and loyalty. *Donahue v. Rodd Electrotype Co. of New England, Inc.*,

367 Mass. 578, 593 (1975), quoting *Cardullo v. Landau*, 329 Mass. 5, 8 (1952) (internal quotations omitted). Essentially, shareholders of a closely held corporation owe to the business and their fellow shareholders “substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.” *Id.* This requires that the shareholders place the welfare of the business and that of the other shareholders ahead of their own personal interests. *Demoulas v. Demoulas Supermarkets, Inc.*, 421 Mass. 501, 529 (1997). Shareholders in a close corporation are thus not permitted to frustrate the reasonable expectations of the other shareholders with respect to share ownership, such as with regard to the fair distribution of income and assets, shared decision-making, control of the business, and the receipt of fair value for their contributions to the enterprise. See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 843, 850 (1976). The law prohibits shareholders in a close corporation from acting out of “avarice, expediency or self-interest” in derogation of their duty of loyalty to the corporation and its other stockholders. *Donahue*, 367 Mass. at 593.

In the current matter, Trowt and Silva accuse each other of breaching the fiduciary duty that shareholders in a close corporation owe to each other and the corporation. The elements of such a claim are: (1) the existence of a fiduciary duty, based upon the relationship of the parties; (2) a breach of that duty; (3) damages; and (4) a causal connection between the breach of duty and the damage suffered. *Hanover Ins. Co. v. Sutton*, 43 Mass. App. Ct. 153, 164 (1989). The determination of whether a breach of fiduciary duty has occurred is a question of law for the court, as is the remedy for such a breach. See *Merola v. Exergen Corp.*, 423 Mass. 461, 461 (1996). It is undisputed that Beverly Storage is a closely held corporation and that, as such, Trowt and Silva owe each other and it a duty of utmost good faith and loyalty. The only

questions left for the court to decide are who breached his fiduciary duty and who is entitled to recover damages.

Trowt's Claims:

Through the evidence presented at trial, Trowt proved, by a preponderance of the evidence, that Silva breached the fiduciary duty he owed him. In particular, Trowt proved the following relevant facts: that, as of 1997, when Beverly Storage was incorporated, he and Silva agreed to split profits on a fifty-fifty basis; that the only way Beverly Storage distributed profits was through the payment of salaries; that Silva was solely responsible for the distribution of profits; and that Silva unilaterally decreased his (Trowt's) share of the profits by decreasing his (Trowt's) salary, and increasing his own salary. In paying himself a higher salary, i.e., splitting profits at a seventy-five to twenty-five percent ratio in his favor, Silva clearly acted out of "avarice" and "self-interest" in derogation of the fiduciary duty he owed Trowt. Consequently, Trowt is entitled to judgment in his favor on Count II (breach of fiduciary duty).

As no contrary evidence was presented at trial on the issue of damages, as a starting point, the court accepts the figures set forth in *The Parker Report*. From 2006 to November 2011, contrary to their agreement to split profits, i.e., to split salaries, on a fifty-fifty basis, Silva paid himself \$359,575.00 in salary while he paid Trowt only \$141,250.00. A fifty-fifty split would have resulted in Trowt and Silva each receiving \$250,412.50. Thus, on Claim II (breach of fiduciary duty), judgment shall enter in favor of Trowt in the amount of \$109,162.50.

In addition, Trowt proved, by a preponderance of the evidence, that Silva breached the fiduciary duty he owed Beverly Storage. In fact, the evidence presented reveals two different, but related, bases for this claim. First, the evidence at trial demonstrated that, between 2006 and 2011, while he was solely responsible for all financial matters related to Beverly Storage's

operations, including payroll and accounts receivable, Silva siphoned revenues and skimmed profits from the business. Second, the evidence at trial demonstrated that, between this same time frame, Silva opened numerous credit accounts in Beverly Storage's name, which he used for his own personal use. For example, the evidence showed Silva used Beverly Storage's accounts to pay for dating websites, department store charges, grocery store charges, personal gas purchases, automotive repairs, and office supplies used in connection with Clear Skys, his personal travel business. In engaging in this wrongdoing, Silva acted out of "avarice" and "self-interest," contrary to the fiduciary duty he owed Beverly Storage. Consequently, Trowt is entitled to judgment in his favor on Count II (breach of fiduciary duty), as derivative of Beverly Storage.

Again, as no contrary evidence was presented at trial on the issue of damages, as a starting point, the court references *The Parker Report*. If Silva had properly deposited all funds he received into Beverly Storage's account for the period 2006 to November 2011, there would have been an additional \$140,815.20 in deposits.⁵ And, if Silva had not used Beverly Storage's money for his own personal use, the company would also have had another \$104,355.00 in revenue. Thus, on Claim I (breach of fiduciary duty) judgment shall enter in favor of Trowt, derivative of Beverly Storage, in the amount of \$245,170.20.

Silva's Counterclaims:

On Counterclaims I and II, judgment shall enter in favor of Trowt. Silva failed to provide sufficient evidence to demonstrate Trowt breached the fiduciary duty he owed him or Beverly Storage. These claims are premised upon several different theories. First, Silva claims Trowt

⁵ *The Parker Report* states that, but for Silva's siphoning of revenue, there would have been an additional \$211,223.00 in deposits between 2006 and 2011. This figure is based upon Parker's estimate that Silva was skimming approximately fifteen percent from Beverly Storage's annual profits. To be conservative, and to take into account the fact that profits for 2013 did not actually show a nineteen present increase, as Parker predicted they would, the court reduces the fifteen percent to ten percent.

breached his fiduciary duty by parking/storing Trowt Moving equipment at 145 Rear Hale Street without paying rent. Second, he claims Trowt breached his fiduciary duty by leaving storage trailers at the Manchester-by-the-Sea location without paying rent. Third, he claims Trowt breached his duty by failing to pay rent for office space he uses at 145 Rear Hale Street.

These assertions fail with little analysis. At trial, Silva failed to establish that there was ever any agreement between Trowt/Trowt Moving and Beverly Storage/Silva whereby Trowt Moving would pay to park its equipment at 145 Rear Hale Street, pay to store trailers at the Manchester-by-the-Sea location, or pay to rent office space at 145 Rear Hale Street. Rather, the evidence established that Trowt Moving and Beverly Storage have a symbiotic relationship. And that, to the extent Trowt Moving benefited from its relationship with Beverly Storage, Beverly Storage equally benefited from that relationship. An example of this symbiotic relationship is demonstrated by the fact that Beverly Storage does not even own a tractor to move its trailers and thus, the only way the storage trailers can be moved from the warehouse in Beverly to the location in Manchester-by-the-Sea is by using Trowt Moving's tractor.

Last, Silva argues that, in charging Trowt Moving customers overnight storage fees, Trowt usurped a corporate opportunity from Beverly Storage. This claim appears to be premised on the idea that, if Trowt did not allow its customers to store their items in its trucks overnight, the customers would pay to store their items at Beverly Storage. This claim is without merit. While it is true that a shareholder breaches "his fiduciary duty by acquiring or diverting a corporate business opportunity for his personal profit[,]” the fact that the corporation would not have been able to avail itself of that opportunity is a defense to such a claim. *Puritan Med. Ctr., Inc. v. Cashman*, 413 Mass. 167, 177-178 (1992). The evidence presented at trial establishes that this was the case in the current matter. Even assuming Trowt Moving's customers would

choose to rent space at Beverly Storage, Beverly Storage did not have the manpower and resources to unload and reload Trowt Moving's trucks all to obtain a one or two-day storage fee.⁶

II. Breach of Contract and Conversion

Trowt's claim for breach of contract (Count III) and his derivative claim for conversion (Count IV) as well as Silva's counterclaim for breach of contract (Counterclaim III) are subsumed into the above analysis. These claims assert the same theories of liability and request, essentially, the same relief. For this reason, the court need not analyze them in detail. Nevertheless, the court notes the following: With respect to the breach of contract claims, judgment shall enter in favor of Trowt. The evidence presented at trial demonstrated the following relevant facts: that Trowt and Silva had an agreement to split profits on a fifty-fifty basis; that Trowt and Silva had an agreement whereby Silva agreed to be responsible for the business's financial and administrative matters while Trowt served as the primary customer contact; that Silva breached this agreement by paying himself a larger salary and misappropriating funds belonging to Beverly Storage; and that Trowt and Beverly Storage were damaged as a result of Silva's conduct. Similarly, as to the conversion claim, judgment shall enter in favor of Trowt, as the evidence presented at trial demonstrated that Silva misappropriated money rightfully belonging to Trowt and Beverly Storage.

III. Silva's Third-Party Claim Against Trowt Moving for Breach of Contract

Silva asserts a third-party claim against Trowt Moving for breach of contract in connection with Trowt Moving's failure to pay for parking its vehicles at 145 Rear Hale Street, failing to pay to store its trailers at the Manchester-by-the-Sea location, and for failing to pay rent for the use of office space at 145 Rear Hale Street. This claim fails. To establish a claim for

⁶ Even if Silva had presented sufficient evidence to factually support his claims for breach of fiduciary duty, Counterclaim II, asserted derivatively on behalf of Beverly Storage, would still fail, as he did not send a demand letter as Mass. R. Civ. P. 23.1 requires.

breach of contract, a plaintiff must demonstrate the following: (1) an agreement exists between the plaintiff and the defendant; (2) the plaintiff fully performed his obligations under the agreement; (3) the defendant breached the agreement; and (4) the plaintiff suffered damages as a result of the breach. See *Singarella v. Boston*, 342 Mass. 385, 387 (1961); see also Richard W. Bishop, *Prima Facie Case* § 2.1, at 13 (2005). At trial, Silva failed to provide sufficient evidence to demonstrate there was ever any agreement between Trowt/Trowt Moving and Beverly Storage/Silva regarding parking, rental payments, or storage fees.⁷ Instead, the evidence demonstrated that Trowt Moving and Beverly Storage worked in a symbiotic relationship where each used the services and facilities of the other on an as needed basis with no formal reimbursement. Judgment shall enter in favor of Trowt Moving on the third party claim for breach of contract.

IV. Accounting

Trowt has sought an accounting in this matter. An accounting is proper where a violation of a fiduciary relationship has been established, but reconciling the rights and obligations of the parties is so complicated that it cannot be conveniently accomplished by the court. See *In re Evangelist*, 760 F.2d 27, 29-30 (1st Cir. 1985); *Crane v. Royster*, 255 Mass. 118, 120 (1926). This is not the case here. Instead, in this case, an accounting appears unnecessary. The evidence demonstrates that Trowt is entitled to damages in the amount of \$109,162.50 for his direct claim of breach of fiduciary duty and in the amount of \$245,170.20 for the claim of breach of fiduciary duty, which he asserts derivatively on behalf of Beverly Storage.

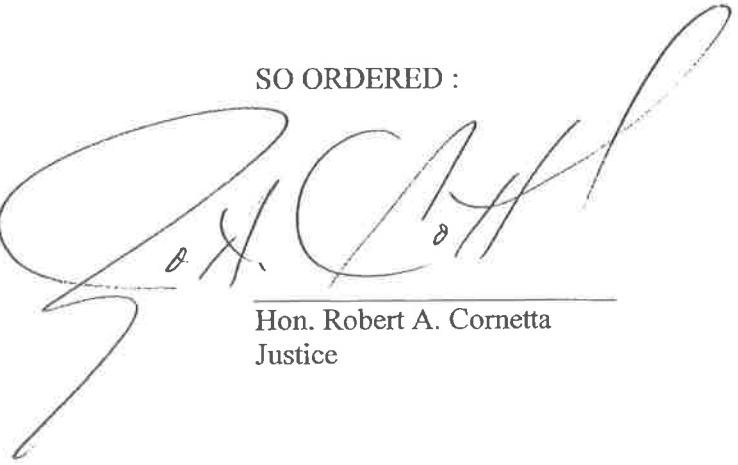
⁷ The only evidence Silva presented in support of the existence of some agreement between Trowt/Trowt Moving and Beverly Storage/Silva regarding the payment of rent are monthly statements, which include an attached transaction history. The court does not find these monthly statements to be credible. The statements identify a due date of December 8, 2006, but are themselves dated in 2011 around the time litigation in this matter began. Such discrepancies with the dates inevitably leads to the inference that these monthly statements are not accurate invoices from the time period in question but, rather, were created solely in connection with the present litigation.

ORDER

Based upon the findings of fact and rulings of law made after trial on the merits, the court shall enter judgment in favor of Trowt as to all claims he asserts individually against Silva as well as to those he asserts derivatively on behalf of Beverly Storage. Judgment shall also enter in favor of Trowt as to all counterclaims Silva asserts individually against him as well as to those Silva asserts derivatively on behalf of Beverly Storage. Finally, judgment shall enter in favor of Trowt Moving as to Silva's third-party claim for breach of contract. Specifically with respect to Trowt's claim for breach of fiduciary duty, judgment shall enter against Silva in the amount of \$109,162.50. And, as to the claim for breach of fiduciary duty Trowt asserts as derivative of Beverly Storage, judgment shall enter against Silva in the amount of \$245,170.20. Judgment is **ORDERED** entered accordingly upon the docket by the clerk magistrate and notice shall be provided to the parties pursuant to Mass. R. Civ. P. 58.

Date: October 31, 2014

SO ORDERED :


Hon. Robert A. Cornetta
Justice